IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 33

UNITED MINE WORKERS OF AMERICA,
DISTRICT 12,

Petitioners,

v.

ILLINOIS STATE BAR ASSOCIATION, an Illinois Not for Profit Corporation, CURTIS F. PRANGLEY, BERNARD H. BERTRAND, WILLIAM FECHTIG, KOREAN MOVSISIAN, HENRY W. PHILLIPS, WILLIAM C. NICOL, JOHN W. HALLOCK, WATTS C. JOHNSON and MARSHALL A. SUSLER, individually and as members of the Committee on Unauthorized Practice of Law of the Illinois State Bar Association,

Respondents.

MOTION AND BRIEF OF NATIONAL LAWYERS GUILD, *AMICUS CURIAE*

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Motion for Leave to File Brief *Amicus Curiae*

The National Lawyers Guild hereby respectfully moves the Court for permission to file a Brief Amicus Curiae in support of Petitioner. Counsel for Petitioner has consented to the filing of this Brief, but counsel for Respondent has withdrawn his consent. (See letters on file with the Clerk of the Court.)

The National Lawyers Guild is a national bar association which has long been interested in broadening the base of available legal services within the ethical standards of the profession. The Guild believes Petitioner's plan to be an important advance in this direction.

The Guild has received the Petition for Writ of Certiorari and the opinion of the Supreme Court of Illinois in the instant case, and believes that the factual data presented herein will not be made available to the Court

by the parties. The data presented in this Brief Amicus Curiae demonstrate the needs of large segments of the population for legal services which is to a large extent not being met by the profession.

For these reasons the National Lawyers Guild respectfully requests permission of the Court to file a Brief Amicus Curiae in support of Petitioner.

Respectfully submitted,

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ALLAN BROTSKY,
DONALD L. A. KERSON,
of Counsel.

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BRIEF OF NATIONAL LAWYERS GUILD, *AMICUS CURIAE*

The National Lawyers Guild is a national bar association with chapters throughout the country. While the Guild has always been concerned with maintaining the integrity of the legal profession, the Guild also recognizes the necessity of extending the availability of legal services to all members of the community. Believing that the Mine Workers plan, under review here, represents a significant contribution toward this end, the Guild submits this brief in support of petitioner.

Serious Unfilled Needs for Legal Services Presently Exist

Surveys of the legal profession conducted in the past several decades have revealed a substantial public need for legal services, which need is not being satisfied by the profession.

In the last twenty years the purchasing power of wage and clerical workers in the United States has doubled,[1] yet the Bureau of the Census still finds it unnecessary even to identify by name any expenditures for legal services by this group. The statistics show an increase in outlay for medical services of 142 percent between 1936 and 1950, and reflect great changes in the nature and character of other outlays.[2] However, aside from "miscellaneous goods and services," the lowest category in absolute figures and percentages, expenditures for legal services, are not reflected.[3] The Bureau of the Census has published data on personal consumption expenditures by type of product from 1929 to 1959, and although "medical care and death expenses" rose from $3,544 million in 1929 to $17,826 million in 1958,[4] there is again no category for legal expenditures. It should also be noted that in the 1930's the average family had a small surplus remaining after expenditures; the average family of 1950 had a deficit of nearly $200.[5] The outlay for legal services by a large segment of the population is virtually nonexistent.

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[1] Williams, "Standards and Levels of Living of City-Worker Families," 79 *Monthly Lab. Rev.* 1015, referring to materials "brought together for the Sub-committee on Low-Income Families of the Congressional Joint Committee on the Economic Report."

[2] *Id.* at 1019.

[3] It has been estimated that expenditures for legal services by persons and entities of all economic levels amount to less than one-third of expenditures for medical services. American Bar Foundation, *Lawyers in the United States: Distribution and Income* (1958).

[4] *Statistical Abstract of the United States* 309 (1960).

[5] Williams, *supra*, note 1, at 1021.

According to a research survey by the American Bar Foundation, of "working class" families with legal problems only "about 30%" consult a lawyer.[6] Of "middle class" families with legal problems, only "about 50%" seek and obtain legal advice.[7] A 1960 supplementary report confirms that the situation has not changed since the original survey was made.[8]

In 1948 Professor Earl Koos collected and analyzed "data concerning the problems experienced by a number of middle-class and working-class families, the extent to which they recognize their need for help, and their use of the lawyer in solving their problems."[9] Koos found that while 60% of the middle-class families with problems consulted an attorney, only 44% from working-class families did so.[10] When the families were asked, "Why didn't you consult an attorney?" 12% of the middle-class felt they were unable to afford the fees as compared with 54% of the working class.

Professor Koos concluded that, "The implications of these findings are such that exploration of the whole problem of the interpretation of the philosophy of law and its potential services to individuals in our society needs to be undertaken."[11]

Although the actual and potential outlay for legal services of persons in the low and middle income groups is small, the need of persons in these groups for such services is nevertheless great. Some commentators of stature have asserted that satisfaction of this need is probably the most pressing, if largely unrecognized, responsibility of the bar

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[6] American Bar Foundation, Research Memorandum Series, "Prepaid Legal Expense Insurance", p. 1.

[7] *Ibid.*

[8] *Id.*, "Supplementary Memorandum on Prepaid Legal Expense Insurance" (March 1960).

[9] Koos, *The Family and the Law*, p. 1 (1948).

[10] *Id.* at 5.

[11] *Id.* at 7.

today.[12] Suffice it to say that although the legal problems of lower-income citizens may differ in kind from the problems of wealthier members of society, they are serious indeed and merit the consideration of the organized bar.

It is surely no exaggeration to say, "The most important problem facing the American legal profession today is that of providing adequate legal services for all the people of this country." [13]

The furnishing of legal services through group action is both efficacious and consistent with legal ethics.

It would seem that permitting non-profit groups, such as Petitioner, to combine their resources to assist their members in obtaining needed legal services would go far toward ameliorating the need on the part of the public for legal services that is now not being fulfilled. As Professor Turrentine has said:[14]

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[12] Justice Thomas J. Brennan, "Address", 55 *Legal Aid Rev.*, No. 1, p. 20 (1957); Brownell, *Legal Aid in the United States* 52-55 (1951); Bar Ass'n of the District of Columbia, *Report of the Committee on Legal Aid* 145-146 (1958); Smith & Bradway, *Growth of Legal Aid Work* (1936); Koos, *The Family and the Law* (1952); *Llewellyn, "The Uncovered Needs for Legal Services,"* 16 *Tenn. L. Rev.* 641, 644 (1944); Note, 13 *U. Chi. L. Rev.* 131. As to the unrecognized character of the need that exists, Professor Robert E. Stone states: "The members of the bar have been so isolated by their practice and social contacts from the great bulk of our city populations that it can truthfully be said that most lawyers are not even conscious of the fact that to most of our American citizens denial of justice in their personal affairs is normal." Quoted in Turrentine, "Legal Service for the Lower-Income Group", 29 *Ore. L. Rev.* 20, 21 (1949).

[13] Note, "Group Legal Services", 79 *Harv. L. Rev.* 416 (1965); Schwartz, "Forward: Group Legal Services in Perspective", 12 *U.C.L.A. L. Rev,* 279, 286-295 (1965). Availability of legal aid through the auspices of the Office of Economic Opportunity programs will not lessen the need for members of *working* class families.

[14] *Supra,* note 12, at 29-30.

> "The simplest, most immediate way of bringing the cost of legal service within the reach of large numbers of our people is to . . . permit non-profit organizations of all kinds, such as trade unions, fraternal orders, consumer's cooperatives, mutual automobile clubs, and business and professional associations, to employ counsel to advise and represent members in their individual affairs. The premise upon which [this is prohibited by] Canon 35 is . . . that the lawyer's duty of undivided loyalty to his client (who in this case is a member of an organization) is subjected to the pressure of a conflicting loyalty if the lawyer is employed and controlled by the organization.
>
> "There is substance to this objection only if the organization is furnishing legal service for a profit, in which case the lawyer might be influenced in the direction of the profit of the organization rather than the welfare of the member. If the purpose of the organization is not to make a profit but to provide its members with service, the likelihood of divided loyalty disappears. Cooperative procurement of legal service should no more be outlawed than cooperative procurement of medical service, now exceedingly common."

Decisions of this Court have established the right under the First Amendment of members of a labor union acting together to promote a particular interest of the group. *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of R.R. Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U.S. 1 (1964). Certainly Petitioner here has sufficient interest in its members' welfare to insure their receiving expert help and adequate awards in industrial accident cases.

A labor union must be capable of acting in the interests of individual members and thereby satisfying individual wants if it is to serve its statutory functions. In the words of Mr. Justice Frankfurter, "As a practical matter the employees expect their union not just to secure a collective agreement but more particularly to procure for the indi-

vidual employees the benefits promised. If the union can secure only the promise and is impotent to procure for the individual employees the promised benefits, then it is bound to lose their support."[15]

The principle just stated has long been established with respect to collective bargaining agreements. More recently, however, particularly since the adoption of Canon 35 in 1928, legislatures and courts have recognized the right of workers to associate for such broad purposes as the promotion of their "common welfare or interest," "benefit," "safety," "protection," "self-defense," "happiness," "mutual help and cooperation," and, generally, for the purpose of "elevating or improving their position," "bettering their conditions," "obtaining lawful benefits" or "redressing of their grievances."[16]

During the last thirty years, unions have evolved from groups oriented almost exclusively toward the conducting of strikes to broad-purpose organizations designed to service the needs of their members.

This evolution in the purposes of labor unions may well be in large part responsible for the increasing demand for legal services on the part of less well-to-do segments of the population. Increasingly, unions have obtained benefits by the negotiation of contracts and the utilization of judicial and administrative procedures rather than by strikes, thus graphically illustrating for their members the potential benefits of law and legal services. The new channels of labor relations which have developed have doubtless encouraged many members of labor unions to view their personal problems more often than formerly in terms of legal

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[15] *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437, 457 (1955). See also *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944).

[16] 98 *C.J.S.*, "Trade Unions", § 9, pp. 769-770. See also CCH, Union Contract Clauses (1954) *passim*.

rights and remedies. This association between unions and law, together with the fact that workers are unlikely to come in contact with attorneys in other ways or even to meet persons who frequently deal with attorneys, probably is in part responsible for the common tendency to seek legal help through unions.

The role of the labor union in the processing and administration of workmen's compensation claims is not one of a mere bystander. It is certainly clear that the efforts of unions were in large part responsible for the enactment of the statutes which make such claims possible.[17] Numerous commentators have observed that these laws are valueless unless proper enforcement is secured through the vigorous and consistent representation of claimants. One of them, Walter F. Dodd, seems to indicate that the handling of individual cases can be of crucial importance to the effectiveness of the law in general.[18]

> "One of the major problems of workmen's compensation is, therefore, that of providing adequate supervision for the settlement of a great mass of cases where there is no real contest. The uncontested claim may present little in the way of controversy between the parties, but it presents much of possible abuse in the relationship between the parties. If the purpose of the compensation law is to be accomplished, there must be adequate supervision to make sure that the employee receives the compensation to which the law entitles him. "Whether the case be contested or uncontested, there is an adversary relation between the parties which has an important bearing upon the administration of compensation laws . . . [W]ith conditions as they are and with the injured employee the weaker party, the pecuniary interest of the insurance carrier may defeat or unduly re-

[17] See Gompers, *Labor and the Employer*, 135 *et seq.* (1920); AFL-CIO Convention, *Proceedings* 198-203 (1957); U.S. Dept. of Labor, Bureau of Labor Standards, *Proceedings of the President's Conference on Industrial Safety*, 73 *et seq.* (1952).

[18] *Administration of Workmen's Compensation*, 55-56 (1936).

> duce proper claims, and, in the interest of the employee, there must be not only a means of determining contested claims but a careful supervision over the settlement of uncontested claims, as well as a continuing supervision to assure full payment of all proper claims."

Other citations to the same effect are set out in the margin.[19]

In any examination of group legal services the persistent and unanswered question is, why it is "that individuals may band together to provide themselves with cheaper insurance, cheaper groceries, higher wages, better prices, easier credit, lower taxes, better health—everything, except better or cheaper advice and aid?"[20]

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[19] Pillsbury, "Workmen's Compensation Court Proceedings", 76 *Monthly Lab. Rev.* 480 (1953); Petsko, "Workmen's Compensation", 76 *id.* 602; Gurske, "Problems of Administration", 76 *id.* 1179; International Ass'n of Government Labor Officials, "Labor Laws and their Administration", 101-102 (1958); U.S. Dep't of Labor, *The American Workers' Fact Book*, 178-201 (1960) ("Safety and Organized Labor"). Of particular interest is the decision of the Supreme Court of Illinois in *In re Brotherhood of Railroad Trainmen*, 150 N.E. 2d 163, 167 (Ill., 1958), upholding the interest of the Brotherhood in "seeking to secure competent legal representation of its members" in FELA cases.

It has been observed that compensation insurance carriers take a lively interest in the problem of obtaining expert representation in such cases. Bear, in "Legal Aid Service to Injured Workmen", 205 *Annals Am. Acad. Pol. & Soc. Sci.* 52 (1939) states: "These companies do not put just any attorney on the job. They train their counsel in workmen's compensation practice and procedure. Their men are given a series of lectures on the law. They are given periodic talks on new amendments and their significance and effect as far as the insurance company is concerned. They are sent out into the field to investigate compensation cases. After an extended period of such intensive training they are sent in before the Industrial Accident Board to battle. . . . [T]he injured worker . . . in far too many cases has no legal representation at all, and if he has, it is not of the skilled and specialized type acting for his insurance antagonist".

[20] Weihofen, "Practice of Law by Non Pecuniary Corporation: A Social Utility," 2 *U. Chi. L. Rev.* 119, 128.

The Supreme Court of Illinois sought refuge from this trouble some question in Canons 35 and 47 of the Canons of Ethics of The American Bar Association and the Illinois State Bar Association. (Petition for Certiorari, page 8.)

Canon 35 offers little support for the Illinois court, as the history of that Canon reveals.

Mr. Henry S. Drinker, who was Chairman of the ABA Special Committee which drafted Canon 35, has stated that the Committee was of the view that the interest of a corporation or association in insuring that its employees or members received adequate legal services with respect to their individual affairs, justified provision by the entity or group of such services. The committee grudgingly added the crucial last sentence of Canon 35 only at the insistence of the ABA Committee on Unauthorized Practice, whose ruling was binding upon it.

Committee Chairman Henry S. Drinker has summarized and explained the development of Canon 35 as follows:[21]

> "The unauthorized practice committee took the position that advice to employees in such matters by a lawyer employed by a corporation constituted the unauthorized practice of law. Our committee tried to change the minds of the unauthorized practice committee but was unsuccessful. . . . We were bound by that, and consequently we capitulated."

The same author explains further in his treatise, *Legal Ethics*, that the "same conclusion follows with regard to a labor union, automobile club, or association providing legal service for its members, although in each case the lawyer had direct relations with the employee member, and though the lawyer's service was restricted to matters in which

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[21] "The Ethical Lawyer," 7 *Fla. L. Rev.* 375, 383.

there was no conflict of interest between the corporation or association and the employee or member."[22]

As Mr. Drinker has pointed out, the rationale provided by the unauthorized practice committee was unsatisfactory in the extreme.[23] Thus the committee said that the governing principle was the Biblical injunction, "No man can serve two masters." Yet this rationale has no application at all to cases where no conflict of interest is involved; and such cases seemingly would make up the vast majority of those stemming from the personal affairs of the employees or members concerned. The committee thus provided no persuasive reason for the adoption of the Canon as to most of the cases which it regulated.

Even more troublesome, the conclusion that representation of members of a group at the group's expense constitutes "unauthorized practice" proves too much. All authorities agree that group employment of counsel is proper where the individual member's problem is of concern to the group as a whole, as in the case of group backing of a suit by an individual to test improper tax practices. Yet such practices involve the identical features which the committee cited in condemning other forms of "group practice" as the unauthorized practice of law. In such cases the group "holds out" to prospective members the furnishing of capable legal counsel as an advantage and inducement, hence there is "indirect" group gain or group "exploitation" of a lawyer's services. The same may be said, indeed, of every liability or title insurance policy which calls for the providing of defense against prospective lawsuits.

Neither at the time Canon 35 was adopted, nor at any time since, has the unauthorized practice committee provided any explanation for these defects in its rationale. We question whether any adequate explanation is possible.

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[22] Drinker, *Legal Ethics* 165 (1953).

The fact that no satisfactory rationale has ever been provided for Canon 35 as applied to "group services" is doubtless one of the reasons why it has had adverse effect on the public relations of the Bar. Chairman Drinker, after stating that in his opinion corporations and associations do have a legitimate interest in assisting their employees or members to obtain legal services, indicated the objections to the rule that readily occur to the public as follows: [23]

> ". . . With all respect for all the good work [the members of the unauthorized practice committee] have done, I think that some of the committee's rulings such as this one, place the bar in an unfavorable light with the public. While the rule ostensibly protects the public against incompetent lawyers, in some cases the real motivation for the ruling of the committee has perhaps been to keep for the little lawyers the ten and twenty-five dollar cases and to protect them from being taken away by a lawyer hired by a corporation. This attitude, or the belief by the public that this is the motivating factor in the rulings degrades the bar in the eyes of the public. It is regarded as a-dog-in-the manger attitude—the bar is trying to keep the public from getting less expensive yet better services. By and large, a lawyer hired by a corporation [or association] for this purpose would give better advice than the little fellow sought for advice of this nature. The bar has an obligation to see that the unauthorized practice committee, in its praiseworthy enthusiasm to protect the public, does not overdo things."

The duty of the bar is to serve the public and, as Mr. Justice Traynor said, "The rules it establishes to govern its professional ethics must be directed at the performance of that duty." *Hildebrand* v. *State Bar of California*, 36 C. 2d 504, 522, 225 P. 2d 508 (1950) (dissenting opinion). Where rules of ethics prevent attorneys from serving the

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[23] Drinker, note 21, *supra, passim.* at 383-384.

public and deprive citizens of their associational rights under the First Amendment the rules cannot stand.

The Supreme Court of Illinois thought that Petitioner's plan could lead to possible situations where there might be a conflict of interest among the attorney, the organization which pays his salary, and the client. Realistically there is no more potential for an attorney abusing the attorney-client relationship in this setting than in any other.

The practice of law encompasses many situations where an attorney could misuse his position to the detriment of a client. There is a built in "potential for evil" in the very nature of legal practice. Yet it has always been regarded as sufficient protection to the public if Bar Associations proceed on a case by case basis to resolve possible conflicts of interest.

There is no suggestion in this record or the legal literature that this would not be a sufficient method of "policing" group legal services. There is nothing inherent in Petitioner's plan that would cause such conflicts. It is significant that although Petitioner's attorneys had processed almost 2000 claims and collected awards of over $2,000,000 in the past six years, there is no suggestion in the record of even one case involving a conflict of interest.

The real benefits accruing to Petitioner's members should not be obscured by the chimerical possibility that conflicts may arise. "Few associations will have any strong interest inconsistent with their members' interest in obtaining legal victory." Note, 79 *Harv. L. Rev.* 416, 421 (1965).

The court below also postulated that Petitioner's plan would serve to "dilute the allegiance of the lwayer to the client, [and] weaken the integrity of their relationship . . ."

The editors of the Harvard Law Review examined this rationale and found that:

> "Such arguments depend upon the highly speculative proposition that a lawyer will not give the same amount of care to a group-referred client as he would to an 'ordinary' client. But the personal attention that an attorney gives a client would seem to depend more on the lawyer's character than on the means by which the client comes to him. While a strong lawyer-client relationship is desirable, it is unlikely that group practice arrangements will weaken such relationships to any substantial extent. This possible disadvantage of group practice plans, standing alone, is not likely to be held sufficient to override the right to associate." (79 *Harv. L. Rev.* 422.)

Finally, it is clear that possible conflicts of interest have not deterred the courts and the organized bar from sanctioning the most extensive group legal service arrangement that now exists: the furnishing of counsel to insured persons, by public liability and other insurance carriers.

The postulated but unproved dilution of the "allegiance of the lawyer to the client" which concerned the court below about the Mine Workers plan actually occurs quite frequently in relations between defendants and the attorneys selected for them by their insurance carriers.[24] Yet the arrangement continues without any reappraisal by the courts or organized bar of the exception to the ethical rules which makes it possible.[25] Furthermore, although insurance against the costs of defending a lawsuit might well include merely paying for the legal services of an attorney selected by the insured himself rather than the company, the insistence of the carriers in selecting specific counsel for their insured likewise goes unchallenged by the organized

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[24] A dramatic example is furnished by what occurred in *Crisci* v. *Security Ins. Co.*, 66 A.C. 435 (— Cal. Rptr. —, (1967).

[25] The exception to Rule 3 of the *Rules of Professional Conduct* of the State Bar of California (1958) is a typical example.

bar. Such a practice manifestly weakens the integrity of the attorney-client relationship.

In short, the spectres conjured up by the Supreme Court of Illinois in justifying its injunction against the Mine Workers plan actually do exist in relations between clients and the attorneys selected for them by their carriers. If economic expediency alone justifies the practice of the insurance industry, how much more clearly does the First Amendment and the public interest call for approval, and expansion, of the plan of the United Mine Workers?

CONCLUSION

The plan of Petitioner under review here is an efficient and ethical means of providing group legal services. It is justified both by the Constitution and by the practical necessity of extending to those who have need of the services of the legal profession.

For the reasons above it is respectfully submitted that the judgment of the Supreme Court of Illinois be reversed.[26]

Respectfully submitted,

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[26] In the preparation of this Brief, Amicus has relied upon a brief before the Board of Governors of the State Bar of California prepared by Norbert Schlei, Esq., and signed by eighty-six prominent California attorneys. The Guild wishes to thank Mr. Schlei for permitting this liberal use of his materials.